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No. 896

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, PETITIONER

v.

GENEVIEVE E. FRANKEL, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF SAMUEL F. FRANKEL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court (R. 12-21)[1] is reported at 192 F. Supp. 776. The opinion of the court of appeals (App. 11-20) is reported at 302 F. 2d 666.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1962 (App. 20). On July 30, 1962, by order of Mr. Justice White, the time within which to

[1] "R." refers to the appendix to the government's brief in the court of appeals; "App." to the appendix to this petition.

file a petition for a writ of certiorari was extended to and including September 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Upon the death of an officer of a corporation, the board of directors authorized the payment, out of corporate assets, of $19,435 to his widow. The question is whether the payment so authorized was a "gift" excludible from the widow's gross income under § 102(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> Sec. 102. Gifts and Inheritances.
>
> (a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

STATEMENT

Samuel F. Frankel died on February 22, 1956. He had been employed for forty years by the Badger Foundry Company and was the secretary-treasurer and sales manager of the company at the time of his death. In a resolution of the board of directors adopted on January 31, 1956, his compensation for 1956 had been fixed at $15,000 plus 10% of the net profits, to be determined and paid semi-annually (R. 8-9). His fixed salary ($1,250 per month) for the first two months of the year had already been paid at the time of Mr.

Frankel's death, and other than the profit-sharing agreement there was no contract, practice,[2] or understanding requiring any further payments.

On March 15, 1956, the board of directors resolved (R. 18-19):

> * * * that in appreciation of the years of faithful and devoted service to the Badger Foundry Company by S. F. Frankel that the management be authorized to pay to Mrs. S. F. Frankel the bonus earned in the first quarter of operations of the company by S. F. Frankel at the rate set at the Directors Meeting of Jan. 31, 1956 and to continue to pay to Mrs. S. F. Frankel the monthly salary that would have been earned by Mr. Frankel for the balance of the calendar year of 1956.

A second resolution, adopted on April 16, 1956, also directed the transfer to Mrs. Frankel of a Chrysler automobile, valued at $2300, that had been used by Mr. Frankel in the business (R. 19).

Pursuant to those resolutions, Mrs. Frankel received during 1956 a total of $19,435 from the corporation, consisting of 10% of the corporation's net profits for the first quarter ($4,635), ten monthly salary payments ($12,500), and the automobile ($2300). The corporation deducted the payments as "Compensation of Officers". Mrs. Frankel (filing a joint return with her husband's estate) reported the receipts as income, but in due course brought suit for refund.

---

[2] During the preceding 25 years, no officer of the corporation had died (R. 10-11).

At the trial, the above facts were stipulated and no other evidence was offered.

The district court held the transfers to be gifts. In its opinion, the court stated that the transfers were to the widow and not to the estate; that "There was no consideration for any of these transfers as plaintiff [Mrs. Frankel] did not and never had had any part in the operation of the corporation's business" (R. 13); that "No [in]flexible legal test can be applied in the determination of what is an [ex]cludible gift"; and that "In my opinion the tax * * * was erroneously assessed" (R. 16). It then directed the plaintiff to submit "findings of fact * * * consistent with the foregoing" (R. 17). In due course, findings were submitted and adopted. Besides a finding that Mr. Frankel "had been fully compensated for all of the services that he had rendered" (R. 18), the only material findings were the following (R. 20):

> X. That the payment by Badger Foundry Company to plaintiff of the money and property above referred to was not intended to be, and was not, made in consideration of or as additional compensation for any services rendered to it by Samuel F. Frankel. Said sums were not paid pursuant to any obligation of any kind or nature, express or implied, owed by Badger Foundry Company to Samuel F. Frankel, to his estate, or to Genevieve E. Frankel, plaintiff herein, and no consideration was given for or on account of said payments.
>
> XI. That the payments made by Badger Foundry Company to the plaintiff herein were

benevolent acts and were intended to be and were made as expressions of sympathy, generosity and kindness to the widow of a deceased officer and employee.

There followed a conclusion of law that the payments "were intended to be and were gifts" (R. 20).

The Court of Appeals for the Eighth Circuit affirmed, holding that the findings were adequate to support the judgment and the evidence adequate to support the findings (App. 11-20).

REASONS FOR GRANTING THE WRIT

This case differs from the *Kuntz* and *Olsen* cases[3] in which we are simultaneously filing petitions for certiorari in that the decision of the trial court (a district court rather than the Tax Court) was adverse to the government and was affirmed by the court of appeals. Thus, to the extent that the conflict of the *Kuntz* and *Olsen* cases with the *Smith* and *Martin* cases (see petition in *Kuntz*) is seen as a conflict over the proper scope of review, a similar conflict cannot be asserted in this case. It is this case, however, that presents most sharply the basic problem posed by the widow bonus cases, and the pressing administrative need for a resolution of that problem would warrant review of this case even if there were not the related conflict in the *Kuntz* and *Olsen* cases.

1. This case and the *Olsen* case were decided on the same day by the same court of appeals. The opinions

[3] *Kuntz* v. *Commissioner*, 300 F. 2d 849 (C.A. 6), *Olsen* v. *Commissioner*, 302 F. 2d 671 (C.A. 8).

reveal that a factor strongly influencing the court of appeals' reversal of the Tax Court's findings in *Olsen* was its conviction that the two cases were not different from each other (or from the numerous other cases in which widow bonuses have been held to be gifts) and that there was no rational basis for reaching a different result. To that extent we are in full agreement with the Eighth Circuit. If the tax consequences of widow bonuses are to be governed by rational rules, the decisions in *Olsen* and this case must stand or fall together. They should for that reason be reviewed together.

The difference between the result reached by the district court in this case (and by numerous other district courts which have held widow-bonuses to be gifts) and that reached by the Tax Court in *Olsen* (and in *Kuntz*, *Smith*, *Martin* and the other recent widow-bonus cases) is not attributable to, and cannot be explained by, a difference in the evidence or in the inferences drawn from it about the actors' state of mind. It is attributable, rather, to the tribunals' varying conceptions of what constitutes a gift. That is strikingly demonstrated by the Tax Court's reversal of its position following this Court's decision in *Commissioner* v. *Duberstein*, 363 U.S. 278. It is obvious that the dozen-odd widow-bonus cases decided by the Tax Court before *Duberstein* were not all different on their facts from all eleven of the cases decided by it since *Duberstein*, yet the Tax Court held for the taxpayer in all of the earlier cases and in none of the later ones. The only difference is the intervening *Duberstein* opinion, and the only explanation is that the Tax Court found in

that opinion (properly we think) cause to think that its conception of a gift had been wrong[4] and revised its action accordingly. The conflict between the Tax Court and the district courts (*i.e.*, those holding widow bonuses to be gifts) is of the same nature and, indeed, of the same origin, for the truth is that the district courts who now disagree with the Tax Court took their "law" originally from the pre-*Duberstein* Tax Court decisions. If the Tax Court's change of heart reflects a revision of its concept of a gift, not a new insight into the facts, then its disagreement with the district courts is necessarily also one of definition, not of fact.

The conflict between the Tax Court and the gift-finding district courts—and to that extent between the Third Circuit decisions affirming the Tax Court and the Eight Circuit's decision here affirming the district court—is, we acknowledge, not a "conflict" in the usual sense. If, however, the reason conflicts peculiarly command this Court's attention is the unseemliness of different jurisdictions reaching different results because of different views of the law, it is even more important to resolve that conflict than it is to resolve the

[4] The Tax Court's leading decision in *Hellstrom* v. *Commissioner*, 24 T.C. 916, readily suggests what its misconception had been. In that case, the Tax Court had conceded it obvious that in all widow bonus cases "the basic reason for the payment is because of the deceased employee's past association with the corporation" (p. 919) but had held the "reasons" for the payment to be irrelevant if the payment otherwise "is" a gift. The essential holding of *Duberstein*, however, was that the reason why a payment is made is not only relevant but is the very basis upon which the characterization as a "gift" is to be made: "the proper criterion," the Court said, "is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer" (363 U.S. at 286).

more formal "conflict" between the *Kuntz-Olsen* and the *Smith-Martin* cases. Should the latter conflict be left to stand, it would mean, to be sure, that the outcome of widow-bonus cases taken to the Tax Court would depend upon the circuit to which the appeal would lie. Leaving the former conflict unresolved, however, would produce even greater diversity, for the outcome would depend, first, upon whether the taxpayer was able to pay the full deficiency in order to take his case elsewhere than the Tax Court (see *Flora* v. *United States*, 362 U.S. 145) and, second, upon the district in which venue of a refund suit would lie (since some of the district courts can be expected to follow the Tax Court).[5]

2. The affirmance of inconsistent trial court decisions in widow-bonus cases not distinguishable on their facts (including any meaningful ultimate facts) creates a virtually insoluble administrative problem. Since even with full knowledge of all the meaningful facts the result cannot be predicted but must be left to the decree of the particular "fact" finder, there is no basis upon which taxpayers and the Commissioner—however well-meaning and candid—can resolve the question and each case, in principle, must be litigated. Yet with 500 cases already accumulated awaiting the outcome of this litigation and with new cases arising almost daily (see *Kuntz* petition), that course seems hardly feasible. Nor can the Commissioner, having the support of the Tax Court and, at least, the Third Circuit, properly

[5] Indeed, if the Court of Claims (available to all taxpayers) should follow the "majority" district court view rather than the Tax Court, the result would depend solely upon the taxpayer's ability to pay the full deficiency and thus escape the Tax Court's jurisdiction.

abandon his position and treat all widow bonuses as gifts.[6] The result is an administrative impasse which can be solved only by the development of concrete guidelines to govern the disposition of widow bonus cases at the administrative and trial levels. With the existing confusion in the lower courts, those guidelines can be supplied only by this Court.

We are conscious of the Court's reluctance, in its opinion in *Duberstein*, to attempt to lay down concrete rules to guide trial courts in the application of the gift exclusion, but we do not believe that counsels against a further examination of the question in the specific context of widow bonus cases. In *Duberstein* and its companion cases, each presenting a "gift" question arising in a very different context, the government sought, as the Court noted, a "universal" definition of a gift, and the arguments made to the Court were concededly somewhat at large. The problem presented by these three cases, in contrast, is a highly particularized one involving a single type of recurrent, virtually standardized, transaction and a very practical day-to-day problem of tax administration. Without now arguing the merits, it is our conviction that, by considering how the rather general criteria of a gift stated in the *Duberstein* case are to be applied to these specific cases, the Court can provide a reliable guide for the disposition of widow bonus cases as a particular class.

[6] In the face of persistently adverse decisions prior to *Duberstein* and the Tax Court's reversal of position, the Commissioner did ultimately surrender for years governed by the 1939 Code. See Rev. Rul. 58-613, 1958-2 Cum. Bull. 913, 914. Now, however, there does not exist even statistical uniformity to which to give way for want of a principle.

Whether or not an answer can be supplied, however, it is that question that is at the heart of the widow-bonus problem, and it must inevitably be considered in a decision even of the *Kuntz* and *Olsen* cases. It can be brought into sharp focus, however, only if the Court has before it cases with contrasting trial court decisions. It is for that reason that we believe the presence of this case before the Court to be essential to an adequate presentation of the underlying question common to all three cases.

CONCLUSION

For the reasons stated, the petition for certiorari in this case should be granted.

Respectfully submitted,

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AUGUST 1962.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,809

UNITED STATES OF AMERICA, APPELLANT,

vs.

GENEVIEVE E. FRANKEL, EXECUTRIX OF THE ESTATE OF SAMUEL F. FRANKEL, DECEASED, AND GENEVIEVE E. FRANKEL, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[May 4, 1962.]

Before SANBORN and MATTHES, Circuit Judges, and GRAVEN, District Judge.

SANBORN, Circuit Judge.

This is an appeal by the Government from a judgment for Genevieve E. Frankel in an action brought by her for the refund of income taxes which she paid for the year 1956. The action is based upon the claim that in her income tax return for that year there had erroneously been included in her gross income nontaxable gifts.

Genevieve E. Frankel is the widow of Samuel F. Frankel, who died February 22, 1956, and the executrix of his estate. Her husband had been employed by the Badger Foundry Company (a corporation), of Winona, Minnesota, for approximately forty years. At the time of his death he was its secretary and treasurer and responsible for sales.

On March 15, 1956, the Board of Directors of the Badger company adopted the following resolution:

> "It was moved by W. W. Meyst and seconded by O. H. Williams and carried, that in appreciation of the years of faithful and devoted service to the Badger Foundry Company by S. F. Frankel that the Management be authorized to pay Mrs. S. F. Frankel the bonus earned in the first quarter of operations of the Company by S. F. Frankel at the rate set at the Directors' Meeting of January 31, 1956, and to continue to pay Mrs. S. F. Frankel the monthly salary that would have been earned by Mr. Frankel for the balance of the calendar year of 1956."

The bonus and the salary which Mr. Frankel would have received in 1956 for the remainder of the year 1956, had he lived, amounted to $17,135.15 (bonus $4,635.15, salary $12,500). That amount was paid to Mrs. Frankel during 1956. On April 16, 1956, another resolution was adopted by the Board of the Badger company "that the 1955 Chrysler New Yorker automobile owned by the company be given to Mrs. S. F. Frankel as soon as transfer of title can be arranged." This car, which had a value of $2,300, was transferred to her in 1956, pursuant to the resolution.

The Badger company in its corporate income tax return for 1956 took a deduction, under "Compensation of Officers," of $21,511.15, representing the salary payments in 1956 to Mr. S. F. Frankel prior to his death, the salary continuation payments made to Mrs. Frankel after his death; the bonus payment made to Mrs. Frankel, and the Company's basis in the car given to her.

The Company had never, upon the death of an employee, made any transfers similar to those made to

Mrs. Frankel, and during the previous twenty-five years there had been no death of any corporate officer.

There was no contract between the Badger company and Mr. Frankel or between it and Mrs. Frankel to make any of the payments which were made to her in 1956 after his death. There was no legal obligation on the part of the Company to make any of the transfers of money or property to her in 1956. She had performed no services for the Company in 1956 or previously and had never been a stockholder, an officer or an employee of the Company. The transfers in suit were made directly to Mrs. Frankel personally, and not to the estate of her husband.

In her 1956 income tax return Mrs. Frankel included in her gross income all but $2,000[1] of the total gratuities which she received from the Company, and paid her tax. On April 20, 1959, she filed a claim for refund in the amount of $1,239.50, the amount of tax paid which was attributable to the inclusion of the gratuities in gross income. Her claim for refund was disallowed. She brought this action to obtain the refund, alleging, in effect, that the gratuities she received from the Company in 1956 were nontaxable gifts, excludable from gross income under Section 102(a) of the Internal Revenue Code of 1954, 26 U.S.C., 1958 ed., § 102(a).[2]

The case was tried by the District Court without a jury. The facts were stipulated. The trial court determined that the gratuities received by the taxpayer from the Company in 1956, subsequent to the death of her husband, were "gifts," and were not includable in

[1] Taxpayer excluded $2,000 under § 101 (b) of the Internal Revenue Code of 1954.

[2] "§ 102. Gifts and Inheritances.

"(a) *General Rule*.—Gross income does not include the value of property acquired by gift, * * *."

her gross income. Judgment was entered in her favor for $3,239.50. It is conceded that that was the amount due her if the transfers were "gifts" as the trial court found. The memorandum opinion of the District Court is reported in 192 F.Supp. 776. That court also ruled that Section 101(b) of the Internal Revenue Code of 1954 does not limit to $5,000 the amount excludable on payments such as those here involved. That ruling is not challenged on this appeal. We are concerned only with the question whether the trial court erred in holding that the gratuities were excludable from gross income as "gifts."

The Government challenges the adequacy of the trial court's findings to support its determination that what the taxpayer received from the Company were "gifts." The Government says that the findings "were not pertinent to the determinative issue of the objective motivation of the transferor—i.e., *why* the payments were made," and that "[t]he decision of the lower court should be vacated, and the case remanded for the purpose of obtaining meaningful findings of fact on the relevant question in this case." The Government also contends that if it be assumed that the trial court's findings were pertinent, "[t]here was no evidence in the record to support a conclusion that the corporate directors transferred corporate assets to the taxpayer because of their personal affection and sympathy for her."

The trial court found, among other things:

"X

"That the payment by Badger Foundry Company to plaintiff of the money and property above referred to was not intended to be, and was not, made in consideration of or as additional compensation for any services rendered to it by Sam-

uel F. Frankel. Said sums were not paid pursuant to any obligation of any kind or nature, express or implied, owed by Badger Foundry Company to Samuel F. Frankel, to his estate, or to Genevieve E. Frankel, plaintiff herein, and no consideration was given for or on account of said payments.

"XI

"That the payments made by Badger Foundry Company to the plaintiff herein were benevolent acts and were intended to be and were made as expressions of sympathy, generosity and kindness to the widow of a deceased officer and employe."

The court's conclusions were stated as follows:

"The payments of the aforesaid sums by Badger Foundry Company to Genevieve E. Frankel, the plaintiff herein, were intended to be and were gifts to her by Badger Foundry Company within the meaning of the provisions of Section 102 (a) of the 1954 Internal Revenue Code, 26 U.S.C. Section 102 (a). The amount of such gifts was not includable in gross income and was not subject to the limitation of the $5,000.00 exclusion provided in Section 101 (b) of the 1954 Internal Revenue Code, 26 U.S.C., Section 101 (b).

"II

"That for the calendar year 1956 defendant erroneously assessed and collected from plaintiff the sum of $3,239.50.

"III

"That defendant owes plaintiff the sum of $3,239.50 with interest at the rate of six percent (6%) per annum from and after April 15, 1957."

Whether more explicit or more meaningful findings and conclusions could have been drawn, we need not decide. It seems obvious that the trial court determined that, under the stipulated facts, the gratuities that the taxpayer received from the Company after her husband's death qualified as nontaxable gifts under § 102(a) of the 1954 Internal Revenue Code.

The Government relies heavily upon what it conceives to be the teachings of the opinion in *Commissioner* v. *Duberstein*, 363 U.S. 278.

We think that the opinion in that case does not require that the instant case be remanded for more "meaningful findings." The opinion in *Duberstein* covered two separate cases. One involved a present of a Cadillac car by Mohawk Metal Corporation, through its president Berman, to Duberstein out of gratitude or in recompense for business favors. The Tax Court decided that the Cadillac was not a "gift." On petition to review, the Sixth Circuit (*Duberstein* v. *Commissioner*, 265 F.2d 28) reversed the Tax Court, holding that its decision was wrong. The Supreme Court disagreed with the Court of Appeals, ruling that the finding of the Tax Court was not clearly erroneous. (Page 291 of 363 U.S.) The other case (*Stanton* v. *United States*, 363 U.S. 278, 281) involved a present of $20,000 by the Trinity Operating Company, Incorporated, to Stanton, who had been for approximately ten years in the employ of Trinity Church in New York City. He was comptroller of the Church corporation and president of the Operating Company. He had resigned from those positions to enter business for himself. The board of directors of the Operating Company, "in appreciation of the services rendered by Mr. Stanton," awarded him a gratuity of $20,000 upon his departure from its employ. The Commissioner determined that the $20,000 gratuity was taxable in-

come. In a suit to obtain a refund of the tax paid as a result of including in gross income the $20,000 gratuity, the District Court held it was a "gift."

The findings of fact and conclusions, made orally, were:

> "The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen [sic] D. Stanton, in the amount of $20,000 payable to him in monthly installments of $2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943."

The Court of Appeals for the Second Circuit reversed the judgment. *Stanton* v. *United States*, 268 F.2d 727. The question of the adequacy of the findings and conclusions of the trial court was not referred to by the Court of Appeals in its opinion. Apparently the only issue tried in the District Court in Stanton's case was whether the gratuity received by him was excludable from gross income as a "gift," and apparently, also, that issue was resolved in favor of the taxpayer. The Supreme Court granted certiorari. Five of the justices of the Supreme Court were of the view that the judgment in the *Stanton* case should be vacated and the case remanded to the District Court for further proceedings "looking toward new and adequate findings of fact." (Page 293 of 363 U.S.)

In the instant case it seems to us that the trial judge

has made it plain by his opinion, findings and conclusions that he had determined that, under the stipulated facts, and under the standards established by *Bogardus* v. *Commissioner*, 302 U.S. 34, 43, and in conformity with *Commissioner* v. *Duberstein*, supra, [*Stanton* v. *United States*] (363 U.S. 278), the taxpayer's return for 1956 included as taxable income nontaxable gifts made to her out of a spirit of sympathy and generosity.

We believe that to remand this case for more "meaningful" findings as to motivation and intent would serve no useful purpose and would merely prolong this controversy. See and compare, *United States* v. *Kasynski*, 10 Cir., 284 F.2d 143, 146, in which the same question as to adequacy of the trial court's findings was raised. As we read the opinion in *Duberstein* (363 U.S. 278), it does not change the criterion laid down in *Bogardus* v. *Commissioner* (302 U.S. 34, 43) for determining what are "gifts" within the meaning of the applicable statute. But see, *Poyner et al., Executors of Estate of Pierpont* v. *Commissioner*, 4 Cir., ... F.2d ..., decided March 21, 1962.

We note that Mr. Justice Frankfurter, in his opinion concurring in *Duberstein* and dissenting in *Stanton*, said (pages 296-297 of 363 U.S.):

> "The Court has made only one authoritative addition to the previous course of our decisions. Recognizing *Bogardus* v. *Commissioner*, 302 U.S. 34, as 'the leading case here' and finding essential accord between the Court's opinion and the dissent in that case, the Court has drawn from the dissent in *Bogardus* for infusion into what will now be a controlling qualification, recognition that it is 'for the triers of the facts to seek among competing aims or motives the ones that dominated conduct.' 302 U.S. 34, 45 (dissenting opinion). All this being so in view of the Court, it seems to me desir-

able not to try to improve what has 'already been spelled out' in the opinions of this Court but to leave to the lower courts the application of old phrases rather than to float new ones and thereby inevitably produce a new volume of exegesis on the new phrases."

To our minds, the findings and conclusions of the trial court are adequate. We think the factual basis for them, although stipulated, was not inadequate and was sufficient to sustain the judgment. Cf. *Poyner et al., Executors of Estate of Pierpont* v. *Commissioner*, supra; *Joskel* v. *Commissioner*, 10 Cir., 296 F.2d 645, 647; *Estate of Kuntz* v. *Commissioner*, 6 Cir., . . . F.2d . . ., decided April 4, 1962.

In *Commissioner* v. *Duberstein*, the Supreme Court said (page 289 of 363 U.S.):

"* * * Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker* v. *Texas & Pacific R. Co.*, 359 U.S. 227; *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341; *Bogardus* v. *Commissioner, supra* [302 U.S. 34] at 45 (dissenting opinion)."

We are satisfied that in the present case the trial judge, whose long "experience with the mainsprings of human conduct" we regard as unsurpassed, did not misconceive or misapply the applicable law in this case to the facts before him.

The history of the Commissioner's past attempts to have gratuities paid to widows of deceased employees made includable in gross income is of no help to the Government, and need not be discussed in this opinion.

The judgment appealed from is affirmed.

JUDGMENT

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 4th, 1962.

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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, PETITIONER

vs.

GENEVIEVE E. FRANKEL, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF SAMUEL F. FRANKEL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT

The statement in government's brief omits some pertinent facts. In addition to those stated, it appears from the record and the findings of fact that deceased had been fully compensated for all services he performed for Badger Foundry Company during his lifetime, there was no precedent for making these payments to his widow, she was not a stockholder, an officer or an employe and had never performed any services for the Company. The payments were made directly to Mrs. Frankel individually and not to her husband's estate.

Conversely, there are no findings that deceased had a controlling interest in the Company (he didn't; he only owned 5.9% of the stock at the time of his death), or that he

was related in any way to the other stockholders or shareholders (he wasn't), or that he or his widow had any control directly or indirectly by family relationship, voting trust or otherwise over any other stockholder or director (they didn't).

As stated in the government's brief the District Court made specific findings that the payments made to the widow were *not* in consideration of or as additional compensation for Mr. Frankel's services; they were *not* paid pursuant to any plan or obligation; they were without any consideration and "* * * *were* benevolent acts and were intended to be and *were* made as expressions of sympathy, generosity and kindness to the widow * * *." (Italics supplied.) (Findings X and XI, Government's brief, pp. 4-5).[1]

REASONS FOR NOT GRANTING THE WRIT

The government argues as a reason for granting the writ that from its analysis of cases decided by the Tax Court that that tribunal had a "change of heart" (p. 7) after *Commissioner v. Duberstein*, 363 U. S. 278 and decided cases in favor of the government which, the government apparently concedes, should have been or would have been decided in favor of the taxpayers in the absence of such a change. This is not a Tax Court case and we submit if a writ were to be issued in any such case it should be only in an appeal from a Tax Court decision. There is no contention that any District Court has suffered any such inconsistencies which, it is claimed, beset the Tax Court. In fact, the government admits that in the usual sense no conflict exists (p. 7). However, it is argued that this results in an "unseemliness" (p. 7) which we respectfully submit is not a ground for certiorari under Rule 19 of this Court.

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[1] Unless otherwise noted, page numbers hereafter refer to government's brief.

The kernel of the government's argument is that it has a backlog of other cases involving the question of payment to widows and that it wants some help to solve an administrative problem that is "virtually insoluble." We submit (1) that the function of this Court is not to solve administrative problems; (2) that the problem is not insoluble; (3) that if a problem exists it is caused by the Commissioner's own stubborn reluctance to follow the rules laid down by the courts in previous cases over the years. This last point is illustrated by the history of widow payment cases.

WIDOW PAYMENT CASES

The natural and normal human reaction of businessmen to materially express their sympathy for the bereaved widow of a respected fellow associate or employe has for years run headlong into the adamancy of the Commissioner and has produced a flood of expensive litigation.

The Internal Revenue Code of 1939, Section 22(b)(2) provided that death benefits paid pursuant to a contractual obligation qualified for a $5,000.00 exclusion from gross income. The companion section in Internal Revenue Code of 1954 is Section 101(b) but it was amended to remove the requirement that the payment must be made pursuant to a contractual obligation.

Under the 1939 Code there was considerable litigation under fact situations similar or analogous to the case at bar. The Commissioner consistently took the position that the payments to widows were not gifts but were contractual obligations subject only to the $5,000.00 exclusion. The courts consistently held that where the payment was voluntarily made directly to the widow who performed no services for the corporation which received no benefit and the husband had been fully compensated the payments were

gifts even though the basic reason for the payments was the deceased's past association with the employer. (The case at bar comes squarely within these criteria.) See *Hahn v. Commissioner*, 13 CCH T.C.M. 308; *Macfarlane v. Commissioner*, 19 T.C. 9; *Hellstrom Estate v. Commissioner*, 24 T.C. 916. After being "severely battered in litigation" (*Bounds v. United States*, 262 F. 2d 876, 4 Cir.), the Commissioner finally gave up and on August 25, 1958 announced that in view of the adverse court decisions he would no longer litigate such cases arising under the 1939 Code. Rev. Rul. 58-613, 1958-2 C.B. 914. Then, rather coyly, he said the Internal Revenue Service's position in cases arising under the 1954 Code would be made at a later date.

Then came two cases which arose under the 1939 Code but were decided after the 1954 Code had become law. *Rodner et al. v. United States*, 149 F. Supp. 233 and *Bounds v. United States*, 262 F. 2d 876. Both were decided in favor of taxpayers following all the prior decisions but, peculiarly enough, both cases contain dicta to the effect that if they had arisen under the 1954 Code the result might be different because the law had been "changed" and "amended". We submit these dicta resulted from some argument by government lawyers and what this judicial carelessness has cost the taxpayers in litigation expense since is anybody's guess.

In any event, the government pounced on these dicta and started litigating cases under the 1954 Code arguing that the law had been changed and promptly lost all of them, including the case at bar, on that issue. *Reed et al. v. United States*, 177 F. Supp. 205, affirmed 277 F. 2d 456; *Cowan v. United States*, 191 F. Supp. 703; and *Wilner v. United States*, 195 F. Supp. 786.

Then came *Duberstein* and, like Don Quixote, the government rode off in another direction. In that case, before this Court, the government argued that "gifts should be defined as transfers of property made for personal as distinguished from business reasons" contending, much as here, that such would solve an administrative problem. This Court expressly rejected that "invitation" and held that previous case law on gifts was not changed, that each case was a fact question for the trier of that issue which must be affirmed if not "clearly erroneous" (363 U. S. 291).

Then, the government got another new notion and argued in *United States v. Kasynski*, 284 F. 2d 143 that a corporation cannot and may not have the personalized feelings required by the principles recognized in *Duberstein*. The Tenth Circuit disposed of this by stating, "This is but a reargument of the question that a gift must be made for 'personal rather than business reasons' ", which, as stated, had already been rejected by this Court.

Imagine our surprise, then, when the government's appeal to the Eighth Circuit completely abandoned the contention that the 1954 Code made any change in the applicable law and did not even argue that the trial court's findings were clearly erroneous. Instead, the government contended the case should be remanded for more "meaningful findings" which the Court of Appeals, Sanborn J., disposed of as follows:

> "We believe that to remand this case for more 'meaningful' findings as to motivation and intent would serve no useful purpose and would merely prolong this controversy. See and compare, United States v. Kasynski, 10 Cir., 284 F. 2d 143-146 in which the same question as to adequacy of the trial court's findings was raised" (p. 18).

"To our minds, the findings and conclusions of the trial court are adequate. We think the factual basis for them, although stipulated, was not inadequate and was sufficient to sustain the judgment" (p. 19).

"We are satisfied that . . . the present case, the trial judge, whose long 'experience with the mainsprings of human conduct' we regard as unsurpassed, did not misconceive or misapply the applicable law in this case to the facts before him" (p. 20).

SUMMARY

In summary, we contend that the writ should not issue because there is no conflict between the decision in the case at bar and decisions of the Courts of Appeal of other Circuits. That simply to solve an administrative problem is not the function of this Court; that if such a problem exists it is due solely to the administrative reluctance over a number of years to apply to the facts the judicial principles announced by the courts.

We suggest that few, if any, similar cases arising under the 1954 Code have been disposed of while the government has been experimenting with its various theories in the courts—and hence the backlog. If it is the policy of the Internal Revenue Service to make a widow's claim for refund so expensive to litigate that she will have to give up, that was very nearly accomplished in this case. Sam Frankel has been dead nearly seven years. To his widow, who supports herself by her own earnings, the some $3,000.00 involved here is proportionately more important than the financial interest of the government. As stated by the Court

of Appeals, this case should come to an end and for these reasons we submit the petition be denied.

Respectfully submitted,

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